

Supreme Court of the United States

OCTOBER TERM, 1962

No. 791

UNITED STATES, ET AL., APPELLANTS

vs.

J. B. MONTGOMERY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

INDEX

	Original Print	
Record from the United States District Court for the District of Colorado		
Complaint	1	1
Appendix "A"—Permit No. MC-72273.....	8	7
Appendix "B"—Order of Interstate Commerce Commission, Division 1, dated January 3, 1958.....	10	10
Appendix "C"—Recommended report and order by Robert A. Joyner, Hearing Examiner	12	13
Appendix A—Authority embraced in Permit No. MC-72273.....	27	29
Appendix B—Authority granted.....	28	31
Attachment—Recommended orders.....	29	32

Record from the United States District Court for
the District of Colorado—Continued

Complaint—Continued

Appendix "D"—Report and order of Interstate Commerce Commission, Division 1, decided September 16, 1960.....	31	36
Dissenting in part, Commissioner Murphy	43	45
Appendix A—Authority embraced in Permit No. MC-72273, dated August 31, 1943	44	47
Appendix B—Additional grandfather rights claimed by applicant.....	46	49
Appendix C—Certificate to be issued to J. B. Montgomery, Inc.....	47	50
Attachment—Order of Interstate Commerce Commission, Division 1, dated September 16, 1960.....	49	51
Appendix "E"—Order of Interstate Commerce Commission, dated May 17, 1961; denying petitions	50	53
Appendix "F"—Order of Interstate Commerce Commission, Division 1, dated September 21, 1961, revoking operating authority, etc.	51	55
Appendix "G"—Certificate of public convenience and necessity No. MC-123639 Sub 2, dated September 21, 1961.....	52	56
Joint answer of the United States of America and the Interstate Commerce Commission.....	55	60
Order substituting party plaintiff.....	62	62
Memorandum opinion and order, Chilson, J.....	64	63
Judgment	77	74
Notice of appeal by the United States to the Supreme Court of the United States.....	78	75
Notice of appeal by the Interstate Commerce Commission to the Supreme Court of the United States	81	77
Clerk's certificate (omitted in printing).....	89	79
Order noting probable jurisdiction.....	90	89

1
[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO**

Civil Action File No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, DEFENDANTS**

[File Endorsement Omitted]

COMPLAINT—Filed January 16, 1962

I

Plaintiff, J. B. Montgomery, Inc., is a corporation organized and existing under the laws of the State of Nebraska, with its principal office being located at 5150 Brighton Boulevard, Denver, Colorado.

II

This is an action to vacate, enjoin, annul, and set aside the report and order of the Interstate Commerce Commission (hereinafter referred to as the Commission), decided September 16, 1960 and the order of the Commission, decided May 17, 1961, in its Docket No. MC-72272 (Sub No. 3) entitled *J. B. Montgomery, Inc., Conversion Application*, to the extent that said report and orders provide for the issuance of a Certificate of Public Convenience and Necessity to Plaintiff in lieu of its Permit containing restrictions limiting the service authorized therein to movements from, to or between outlets or other facilities of particular classes of shippers.

[fol. 2]

III

The jurisdiction of the Court is founded upon Title 28, Sections 1336, 1398, 2284, 2321, 2323, 2324 and 2325, and

Title 5, Section 1009 of the United States Code. The United States of America is named as a defendant pursuant to Title 28, Section 2322 of the United States Code.

IV

For a number of years prior to September 21, 1961, Plaintiff conducted operations in interstate or foreign commerce as a motor contract carrier pursuant to a Permit issued by the Commission in Docket No. 72273. A copy of said Permit is attached hereto as Appendix A and made a part hereof.

V

On August 22, 1957, Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c), was amended to read as follows:

(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

VI

Pursuant to the aforesaid provisions of Section 212(c), the Commission, by an order dated January 3, 1958, instituted a proceeding in Docket No. MC-72273 (Sub No.

3) to determine whether the then outstanding Permit of [fol. 3] Plaintiff should be revoked and in lieu thereof a Certificate of Public Convenience and Necessity issued authorizing the transportation of the same commodities between the same points or within the same territory as authorized in the said Permit. A copy of said order is attached hereto as Appendix B and made a part hereof.

VII

Hearings were held on the proceeding in Docket No. MC-72273 (Sub No. 3) on May 19, 20 and 21, at Denver, Colo., before Examiner Robert A. Joyner. By a consolidated report and recommended order served September 26, 1958, which included the proceeding in Docket No. MC-72273, *J. B. Montgomery, Inc., Modification of Permit*, the Examiner found that Plaintiff's operations on August 22, 1957 did not, and presently do not, conform with the definition of a contract carrier as set forth in Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), that such operations are those of a common carrier and are otherwise lawful, and that Plaintiff should be issued a Certificate of Public Convenience and Necessity in lieu of its Permit. In his report, the Examiner concluded that it would be inconsistent and incompatible with Plaintiff's duty as a common carrier to have Plaintiff's authority restricted in a manner similar to the so-called "Keystone" type restriction contained in its Permit; and, the authority recommended to be granted contained no such restrictions. A copy of the report and order of Examiner Joyner is attached hereto as Appendix C and made a part hereof.

VIII

Exceptions to the report and recommended order of Examiner Joyner were filed by certain protestants to the [fol. 4] proceeding in Docket No. MC-72273 (Sub No. 3), and Plaintiff replied thereto. By a report and order decided September 16, 1960, Division I of the Commission affirmed the findings of Examiner Joyner that Plaintiff's operations did not conform with the definition of a con-

tract carrier, were those of a common carrier and otherwise lawful and that Plaintiff was entitled to a Certificate of Public Convenience and Necessity in lieu of its Permits, but concluded that the authority granted should be restricted to movements from, to or between outlets or other facilities of particular businesses of the class of shippers with whom Plaintiff had contracts as a motor contract carrier. The authority granted was so restricted. A copy of the report and order of the said report and order of Division I of the Commission is attached as Appendix D hereto and made a part hereof.

IX

Petitions for Reconsideration were filed by both Plaintiff and certain protestants in Docket No. MC-72273 (Sub No. 3), and Plaintiff and certain protestants replied to the respective petitions. By an order, dated May 17, 1961, a copy of which is attached hereto as Appendix E and made a part hereof, the Commission denied all of said petitions. Plaintiff has exhausted its administrative remedies.

X

By an order dated September 21, 1961, in Docket No. MC-72273, a copy of which is attached hereto as Appendix F and made a part hereof, Division I of the Commission ordered that Docket No. MC-123639 (Sub No. 2) be assigned to the Certificate of Public Convenience and Necessity authorized to be issued to Plaintiff in Docket No. MC-72273 (Sub No. 3) and that the operating authority contained in Permit No. MC-72273 be revoked. On the same date, Plaintiff was issued a Certificate of [fol. 5] Public Convenience and Necessity in Docket No. MC-123639 (Sub No. 2), a copy of which is attached hereto as Appendix G and made a part hereof. Said Certificate of Public Convenience and Necessity contained the type of restrictions described in the said report of Division I in Docket No. MC-72273 (Sub No. 3) limiting the authority granted to movements from, to or between the outlets or other facilities of certain classes of shippers.

XI

The report and order of the Commission, decided September 16, 1960, and the order of the Commission, decided May 17, 1961, to the extent that said report and orders provide for the issuance of a Certificate of Public Convenience and Necessity to Plaintiff in lieu of its Permit containing restrictions limiting the service authorized therein to movements from, to or between outlets or other facilities of particular classes of shippers, is arbitrary, capricious, unlawful and an abuse of the Commission's discretion and authority, for the following reasons:

- (1) The imposition of such restrictions exceeds the statutory authority of the Commission under Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c) or any other applicable sections of said Act, 49 U.S.C. 301-328.
- (2) Such restrictions limit the commodities which Plaintiff is authorized to transport and the territory which it is authorized to serve, and Plaintiff therefore was not authorized to receive, nor did it receive, a Certificate of Public Convenience and Necessity which [fol. 6] authorizes the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in its Permit, as provided in Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c)
- (3) Such restrictions are in contravention of and inconsistent with, Plaintiff's duty as a common carrier to offer its services to the general public in the transportation of the commodities, and within the territories, authorized in its Certificate of Public Convenience and Necessity.

WHEREFORE, THE PREMISES CONSIDERED, Plaintiff respectfully prays:

- (1) That this, its Complaint, be filed, and that all proper process issued and be served upon defendant, United States of America and the Interstate Commerce Commission;

(2) That the Court, as soon as may be practicable after filing of this Complaint, call to its assistance for hearing and determination of the issues, two other judges, one of whom shall be a Circuit Judge as provided in Section 2284 of the Judicial Code, 28 U.S.C. § 2284;

(3) That an order be issued by this Court enjoining, annulling and setting aside the report and order of Division I of the Commission of September 16, 1961 and the order of the Commission of May 17, 1961 to the extent heretofore provided, and remanding the [fol. 7] proceeding to the Commission with instructions that said report and orders, and the Certificate of Public Convenience and Necessity issued to Plaintiff pursuant thereto, be modified to exclude any restrictions limiting the service authorized to movements from, to or between the outlets or other facilities of shippers of certain classes.

(4) That this Court grant Plaintiff such other and further relief as may be lawful, just and proper in the premises.

/s/ Charles W. Singer

/s/ Joseph W. Morrissey, Jr.

OF COUNSEL

Charles W. Singer
33 North LaSalle Street
Chicago 2, Illinois

Holme, Roberts, More & Owen
1700 Broadway
Denver 2, Colorado

PERMIT

NO. MC 72273

J. B. MONTGOMERY, INC.
COZAD, NEBRASKA

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 5, held at its office in Washington, D. C., on
the 31st day of August A. D. 1943

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder; and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Permit, subject, however, to such terms, conditions, and limitations as are now or may hereafter be attached to the exercise of the privileges herein granted, to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements for the transportation of the commodities indicated and in the manner specified below;

IRREGULAR ROUTES;

Dried beans,

From points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials, and supplies* used in the conduct of such businesses,

From Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation or return, except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packing house products:

Such commodities are usually dealt in, or used by, meat, fruit, and vegetable packing houses,

[fol. 9] Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

9
Such commodities as are usually dealt in, or used by,
wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue
Island, Ill., on the one hand, and, on the other
points and places in Kansas, Nebraska, and
Iowa, those in Colorado on and east of U. S.
Highway 87 and on and north of U. S. Highway
50, and those in Illinois north of a line extending
from a point on the Missouri-Illinois State line
directly west of Springfield, Ill., through Spring-
field, to the Illinois-Indiana State line.

AND IT IS FURTHER ORDERED, That this permit shall be
effective from the date hereof and shall remain in effect
until suspended, changed, or revoked, as provided in said
Act.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

[SEAL]

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the date shown on the reverse of this Order.

CONVERSION PROCEEDINGS

(Docket Number and Name Shown on Reverse)

It appearing, That a permit, or permits, described on the reverse of this order, authorizing operations in interstate or foreign commerce as a contract carrier by motor vehicle, have been issued under Part II of the Interstate Commerce Act on or before August 22, 1957, to the carrier named on the reverse of this order;

It further appearing, That there is reason to believe that the operations conducted pursuant to said permit or permits may not be those of a contract carrier as defined in Section 203(a) (15) of the Act, as amended, and may be those of a common carrier;

It is ordered, That a proceeding be, and it is hereby, instituted under Section 212(c) of the Interstate Commerce Act, upon the Commission's own initiative, to determine whether the outstanding permit or permits described on the reverse of this order, should be revoked and in lieu thereof a certificate of public convenience and necessity issued authorizing the transportation of the same commodities between the same points or within the same territory as authorized in the permit or permits.

And it is further ordered, That the carrier named on the reverse of this order, is hereby made the respondent in this proceeding.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

[SEAL]

[fol. 11] No. MC 72273 (Sub No. 3), INSTITUTED ON
January 3, 1958.

Respondent: J. B. MONTGOMERY, INC.
2430 E. 40th Avenue
Denver 5, Colorado

Respondent's attorney: Charles W. Singer
1825 Jefferson Place, N.W.
Washington 6, D. C.

Proceeding instituted under section 212(c) of the Interstate Commerce Act to determine whether the operating authority as a contract carrier presently held by respondent should be revoked and in lieu thereof a certificate of public convenience and necessity issued to operate as a *common carrier* of the same commodities between the same points or within the same territory as authorized in the following permit;

No. MC 72273, dated August 31, 1943

Dried beans, over irregular routes, from points in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials, and supplies* used in the conduct of such businesses, subject to a "Keystone" restriction, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr.

Such commodities, as are usually dealt in, or used by, meat, fruit and vegetable packing houses, subject to a "Keystone" restriction, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska and

Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

Such commodities as are usually dealt in, or used by, wholesale and retail department stores, subject to a "Keystone" restriction, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other points in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 12] APPENDIX "C" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Served

Sept. 26, 1958

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C., and served on all other parties in interest, within 35 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 25 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-72273¹

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

Decided _____

1. In No. MC-72273, petitioner found to be entitled to additional authority by reason of operations conducted on July 1, 1935, and continuously since that time. Issuance of amended authority approved upon compliance with certain conditions.
2. In No. MC-72273 (Sub-No. 3), applicant's operations on August 22, 1957 found to be those of a common carrier by motor vehicle.
3. Petitioner in No. MC-72273 and applicant in No. MC-72273 (Sub-No. 3) found entitled to a certificate in lieu of its outstanding permit, authorizing described operations. Issuance of a certificate in lieu of presently held permit, including additional authority granted in No. MC-72273, approved upon compliance with certain conditions, and applications in all other respects denied.

Charles W. Singer for applicant in both proceedings.

John H. Lewis, Robert D. Means, Edward G. Bazelon, Howard D. Hicks, Alvin J. Meiklejohn, Jr., and Marion F. Jones for protestants in both proceedings, and *W. S. Pilling* for protestant in No. MC-72273 (Sub-No. 3).

¹ This report also embraces No. MC-72273 (Sub-No. 3), J. B. Montgomery, Inc., Conversion Application.

[fol. 13]

REPORT AND ORDER

RECOMMENDED BY ROBERT A. JOYNER,
HEARING EXAMINER

These proceedings were heard separately, but concern somewhat related matters, and will be the subject of a single report and of separate recommended orders.

In the title proceeding, by petition dated November 20, 1957, J. B. Montgomery, Inc., of Denver, Colo., hereinafter called Montgomery, seeks waiver of Rule 101(e) of the Commission's General Rules of Practice, and reopening of the "grandfather" clause application of its predecessor in No. MC-72273 for the purpose of modifying the authority questioned therein to conform to asserted actual operations being conducted on or before July 1, 1935, and continuously thereafter, or in lieu thereof to assign the instant petition for oral hearing. Upon consideration of the record and of said petition, the Commission, division 1, by order entered March 26, 1958 granted the requested waiver of Rule 101(e), accepted the said petition for filing, and assigned same for oral hearing at a time and place to be thereafter fixed. By order entered April 11, 1958 the matter was assigned to the examiner for hearing and recommendation of an appropriate order thereon, accompanied by the reasons therefor.

In No. MC-72273 (Sub-No. 3), by order entered January 3, 1958, the Commission, division 1, on its own initiative, instituted a proceeding under section 212(c) of the Interstate Commerce Act to determine whether the outstanding permit held by Montgomery in No. MC-72273 should be revoked and in lieu thereof a certificate of public convenience and necessity issued authorizing the transportation of the same commodities between the same points or within the same territory as authorized in the permit.

In a subsequently filed application, filed February 18, 1958, Montgomery seeks a certificate of public convenience and necessity as a common carrier by motor vehicle, in interstate or foreign commerce, of the same commodi-

ties between the same points or within the same territory as authorized in permit No. MC-72273. The proceeding instituted by the Commission on its own initiative, and that reflected by the application of Montgomery, were [fol. 14] considered as a single proceeding presenting the single issue of conversion from a contract carrier authority to that of a common carrier and together were assigned No. MC-72273 (Sub-No. 3). By order entered April 10, 1958 the matter was assigned to the examiner for hearing and the recommendation of an appropriate order thereon, accompanied by the reasons therefor. Hearing in No. MC-72273 was held on May 19, 1958, and in No. MC-72273 (Sub-No. 3) on May 19, 20, and 21, 1958, at Denver. A number of motor carriers* appeared in opposition.

No. MC-72273.—By application in No. MC-72273, filed February 10, 1936, petitioner's predecessor, Joseph Burton Montgomery, doing business as Montgomery Transfer, of Denver, sought a permit or a certificate of public convenience and necessity under the "grandfather" clauses of sections 209(a) and 206(a) of the Interstate Commerce Act authorizing him to continue operation, in interstate or foreign commerce, as a contract or common carrier by motor vehicle of commodities generally, except livestock, coal, and milk, between Denver, and Chicago, Ill., over specified regular routes, serving numerous intermediate and off-route points. Subsequently petitioner corporation acquired the assets of the original applicant, and by notice dated February 5, 1938 the Commission, through the Bureau of Motor Carriers, advised the parties that the petitioner corporation had been substituted as applicant in No. MC-72273.

* Illinois-California Express, Inc., of Denver; Interstate Motor Lines, Inc., of Salt Lake City, Utah; Denver-Chicago Trucking Company, Inc., of Denver; Ringsby Truck Lines, Inc., of Denver; Navajo Freight Lines, Inc., of Denver; Watson Bros. Transportation Co., Inc., of Omaha, Nebr.; Centennial Truck Lines, Inc., of Denver; and Buckingham Transportation, Inc., hereinafter called Illinois-California, Interstate, Denver-Chicago, Ringsby, Navajo, Watson, Centennial, and Buckingham, respectively, appeared in both proceedings, and Pacific Intermountain Express Co., hereinafter called P.I.E., appeared in No. MC-72273 (Sub-No. 3).

Following informal field investigations and the issuance of so-called compliance orders, outlining the authority proposed to be granted, a permit was issued to Montgomery in No. MC-72273 on August 31, 1943. Said permit authorized Montgomery to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements for the transportation of the commodities and in the manner as stated in appendix A hereto.

[fol. 15] Petitioner, in connection with its operations under the authority described, has been transporting rubber tires and rubber products from Denver to various points for Gates Rubber Company, hereinafter called Gates. It asserts that its predecessor was so operating on and prior to July 1, 1935, and that it and its predecessor continuously have performed such transportation since that date. Recently, in answering a questionnaire required of all contract carriers in connection with review of contract carrier operations under amended provisions of the act, the authority of petitioner to perform such transportation was brought into question. Petitioner accordingly filed the instant petition to modify and amend its permit, to clearly include authority to perform the transportation involved, by reason of operations claimed to have been conducted continuously since prior to July 1, 1935.

This proceeding is for the purpose of hearing and determining the matters contained in the above-described petition, and as the petition asserts a "grandfather" right to continue certain operations, consideration will be given herein to evidence submitted concerning such operations and any right petitioner may have under the act to a permit authorizing the continuance thereof.

The record contains a deposition of Joseph Burton Montgomery, predecessor of petitioner, taken while he was ill in Phoenix, Ariz. In this deposition the said Joseph Burton Montgomery avers that he commenced the operation of trucks, as a motor carrier, as an individual, in or about the year 1932; that the business was incorporated in or about 1938; that he was president and principal stockholder of the corporation until about 1945.

when his son took over the operation; that in the period prior to July 1, 1935 he often drove one of his trucks; that he transported shipments of tires and other rubber articles from Denver to Chicago, for Gates, and some westbound service from Chicago to Denver for the same company, all under a verbal agreement; that this transportation service was performed continuously by him, and by the successor corporation under his direction and management, since prior to July 1, 1935 to the date he [fol. 16] relinquished direction and management of the corporation to his son in 1946; that he kept only a very limited bookkeeping system, and records of his operation were destroyed in 1935 or 1936.

Joseph Burton Montgomery, Jr., the son of the founder of the petitioner, assumed control of the corporation in 1946; he has available records dating back to 1942, and that records prior to that period have been destroyed; that to his personal knowledge and recollection the company has always served Gates in the transportation of rubber tires and other products, from Denver to Chicago and Omaha, Nebr., and in the return direction the transportation of supplies and equipment for Gates; that some transportation of supplies and equipment was conducted from points within about 100 miles of Chicago; that petitioner would be willing to have any modified authority limited to service for Gates; and that if pursuant to another pending application, petitioners present permit as a contract carrier is converted to a certificate as a common carrier, it would desire that modified authority sought herein be also converted.

The vice-president for traffic of Gates, employed by that company since 1912, has personal recollection of using Montgomery, Sr., for the transportation of tires, tubes, hose, mats, belting, and other types of rubber goods, from the Gates plant at Denver to Chicago and Omaha. He recalls that Montgomery, Sr., was first used in about 1932 and that Gates has continuously used petitioner and its predecessor for that type of transportation to the present date. Montgomery, Sr., and the corporation also have been used for the transportation of machinery and supplies since prior to July 1, 1935.

with origins at Niles, Mich., Hammond, Ind., and Wadams Grove and Waukegan, Ill. The sales manager of Gates, at Denver, was formerly manager of Gates' warehouse at Chicago, particularly during the period January 15, 1929, to August 1, 1936, and personally saw numerous shipments from Denver unloaded at the warehouse dock in Chicago during the period starting in 1932 until his transfer from Chicago to Denver. An insurance agent and broker commenced writing insurance for Montgomery, Sr., on January 15, 1935, covering shipments of [fol. 17] tires from Denver to Chicago for Gates. A truck dispatcher for petitioner, who drove a truck for Montgomery, Sr., before and after the critical date, recalls transporting tires from Denver to Chicago in trucks belonging to Montgomery, Sr., and shipped from the Gates plant in Denver. A stone contractor, in Denver, drove trucks for Montgomery, Sr., from 1936 to about 1942, and during that period handled shipments to and from the Gates plant in Denver. The president of Buehler Transfer Company, of Denver, operated a household goods storage and transfer business in 1932 and 1933, also drove a truck for a competitor of Montgomery, Sr., and often saw the trucks of Montgomery, Sr., loading and unloading tires at the Gates' plant in Denver. A person now with the General Iron Works Co., in Denver, was traffic manager for Armour and Company at their Denver meat packing plant from 1931 to 1944. He first knew Montgomery, Sr., in 1932, and personally assisted him in drawing up the original written contract with Gates in 1936, and was present at and assisted Montgomery, Sr., at conferences with the Commission's field representatives on the basis of which the compliance orders were issued. He recalls that Montgomery, Sr., transported tires for Gates, and was of the opinion that the authority granted in the permit embraced authority to transport tires.

Opposing carriers submitted evidence of their operating authority and by stipulation with counsel for petitioner, gave a brief indication of their operations between Denver and Chicago. They contend that petitioner has not shown that it and its predecessor conducted transportation as it alleges, since prior to the critical date, and that the permit should not be modified as sought by petitioner.

Petitioner, at the hearing, through its president, indicated that it desired modification of the present permit so as to include, in addition to authority now embraced in the permit, authority to transport (1) such commodities as are dealt in or used by manufacturers of rubber and related products, and materials, equipment, and supplies used by such manufacturers, between Denver, on the one hand, and, on the other, Chicago and Omaha; and (2) materials, equipment, and supplies used [fol. 18] by the manufacturers of rubber and rubber products, from points in Illinois within 100 miles of Chicago, to Denver.

Discussion and Conclusions.—The authority presently held by applicant embraced in the permit issued August 31, 1943, insofar as the operations involved in the instant proceeding are concerned, apparently would permit the transportation of these and probably other of the involved commodities, between the affected points, but only under contracts with those who conduct certain specified businesses. Such businesses are (1) wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automotive accessories; and (2) wholesale or retail department stores, the business of which is the sale of general merchandise. Gates is a manufacturer of tires, and other rubber goods, and the sale of such articles, either wholesale or retail, though a necessary part of its operations, is not its primary business. There is no evidence of record that the business of Gates fits into either category as described in (1) and (2) immediately above. Accordingly, the operations of petitioner in performing transportation of described commodities and between described points for Gates has been and is without authority.

Montgomery, Sr., and his son, the present president of the petitioner corporation, were of the opinion that the authority described in permit No. MC-72273 embraced authority to perform the described transportation for Gates. It is clear that Gates was included in the list of shippers named in the application filed February 10, 1936, and was named as one with whom the applicant had a verbal contract. It is also clear from all of the evi-

dence that Montgomery, Sr., on and prior to July 1, 1935, and he and his successor corporation continuously since that date, transported and have transported the described commodities between the points specified and described, for Gates as shipper and consignee. Although such transportation, since August 31, 1943, was and has been performed without authority, such operations were conducted bona fide and under a misapprehension of the scope of the authority held. Such unlawful operations [fol. 19] in the circumstances described should not be a bar to a revision of the permit to include actual operations so performed.

The evidence indicates only the movement of rubber and rubber products, principally tires, from Denver to Chicago and Omaha, and of materials, equipment and supplies from Chicago and the Chicago area to Denver. The authority granted will be so restricted.

The examiner concludes that petitioner's present authority should be modified to include authority for the operations conducted for Gates, as hereinbefore described. No revised permit should be issued, however, and the authority granted as described in the findings herein should be issued additional to the authority presently embraced in the outstanding permit, in accordance with and in the manner described in the findings in this report in No. MC-72273 (Sub-No. 3).

No. MC-72273 (Sub-No. 3).—In this proceeding Montgomery, hereinafter called applicant, seeks a certificate of public convenience and necessity in lieu of its outstanding permit as described in appendix A hereto.

The instant application was filed pursuant to amendments to provisions of part II of the act which became effective August 22, 1957. Section 212(c), an added provision, reads as follows:

The Commission shall examine each outstanding permit and may within 180 days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate

of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third are otherwise lawful. Such certificate, so issued *shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.* (Emphasis supplied).

Section 203(a) (15) was changed to read as follows:

The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than [fol. 20] transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

On August 22, 1957 applicant had 12 effective individual continuing contracts with 12 shippers for transportation by it of property in interstate or foreign commerce. Another such contract with an additional shipper was added on March 7, 1958. It maintains a terminal and office at Denver, an office in Chicago, and operates about 8 tractors and 14 trailers, all of conventional types. Some of the trailers are equipped with mechanical refrigeration, and some of the tractors and trailers are leased from owner-operators. None of the motor vehicle equipment was assigned for a continuing period of time to the exclusive use of any shipper or person served and its transportation services were not designed to meet a distinct need of any individual customer. No shipper advertising is

displayed upon any of its equipment. Much of its transportation is in truckloads. Applicant is not under common control or management with any other motor carrier. It maintains rates which are published and filed in compliance with the requirements of the act and the rules and regulations of the Commission thereunder.

Six of its contracts, effective on August 22, 1957 and currently effective, are with meat packinghouses; two are with canning companies; three with department stores; and one with a rubber goods manufacturer. The contract added on March 7, 1958 is with a wholesale household furnishings company. Applicant actively solicits traffic from other shippers, and holds its service out to any shippers that would enter into contracts covering their transportation requirements, throughout the territory served by it and within the authority embraced in its permit. The contract with the rubber goods manufacturer, Gates, was considered by applicant to be within the authority embraced in the permit to enter into contracts with those who operate wholesale or retail department stores, the business of which is the sale of general merchandise.

[fol. 21] Some shipments transported by applicant originated at or were destined to points not authorized to be served by it and were received from or delivered by it to motor common carriers serving such points. Such traffic was moved by applicant principally between Denver and Chicago, on its own bills of lading, own freight bills, and own schedule of rates. Its traffic is unbalanced, the heavier movement being eastbound from Denver and on westbound movements from Chicago applicant often has leased its motor vehicle equipment to motor common carriers. Some equipment for eastbound movements also has been leased from motor carriers.

Applicant submitted statements of its assets and liabilities, and operating income and expenses, from which it is apparent that it is fit and able, financially, properly to conduct the described operations.

Protestants submitted copies of their certificates and described generally their authority and operations. They are motor common carriers, and are authorized to trans-

port general commodities, with exceptions, and specified commodities, over regular and irregular routes between the points and in the territory served by applicant. Their opposition is based upon the fear that their operations and revenues will be injuriously affected if applicant is granted a certificate in lieu of its outstanding permit unless restrictions hereinafter described are attached to any certificate that may be issued herein. Much of the evidence adduced by protestants' witnesses relates only to the effect granting of a certificate might have upon their traffic. Such evidence will be discussed only generally.

The issues primarily involved in this proceeding are those set forth in section 212(c) and briefly stated are, (1) whether applicant's operations, on August 22, 1957 were or were not in conformity with the revised definition of a contract carrier as stated in section 203(a) (15); (2) whether such operations are those of a common carrier; and (3) whether applicant's operations are otherwise lawful. On the evidence of record in this proceeding it is clear that applicant's operations on August 22, 1957 did not meet the criteria set forth in the amended definition of contract carrier, and did not and does not [fol. 22] now conform thereto; and that as then and presently conducted, and as intended to be conducted, they are the operations of a common carrier. Certain of the operations of applicant, although not within the authority embraced in its permit, evidently were conducted in good faith in the belief that the said operations were within its authority. Certainly there is no evidence to warrant a conclusion that unauthorized operations were a knowing and wilful violation of the act. Since the operations in question were carried on in good faith under color of right of the "grandfather" clause, and subsequent to issuance of the permit under a bona fide belief that they were within the authority, the operation without authority should not now bar the issuance of a certificate. Giving due consideration to all of the circumstances, operations of applicant properly may be considered "otherwise" lawful, within the meaning of the statute. It follows that applicant's presently held permit

should be revoked and a certificate of convenience and necessity issued in lieu thereof.

In arriving at this conclusion, due consideration has been given to the evidence adduced by protestants. However, the existence of service of presently authorized motor common carriers, and the adequacy thereof to meet shippers' needs, is not a pertinent issue here, and the only tests applicable to determine whether a certificate should be issued applicant in lieu of the permit, are those specifically set forth in amended section 212(c).

There remains to be considered what restrictions, if any, should be attached to the authority in the certificate to be issued. Protestants believe that unless the authority included in the certificate is restricted in respects hereinafter described, their traffic and revenues will be injuriously affected. They are of the opinion (1) that the present Keystone restrictions on certain of applicant's contract carrier authority should be continued as restrictions on the authority as a common carrier in the certificate when issued; (2) that the authority should be restricted against interchange with other motor common carriers; and (3) that the authority should be restricted [fol. 23] against tacking, or combining, separate grants or separate statements of authority held by applicant now or in the future, for the purpose of providing a through service. Applicant is averse to the imposition of such restrictions.

The purpose of the aforesaid restrictions generally is known and well understood, and a detailed explanation is not necessary. At the outset, however, it is clear that the statute does not specifically require that such restrictions be placed in the certificate. It is entirely within the discretion of the Commission whether the authority shall be restricted, unless some requirement to do so reasonably can be read into the wording of the statute.

Amended section 212(c) provides that the certificates issued under the authority of its provisions:

... shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

The present permit carries the Keystone restrictions against certain of the authority included therein, but not as to all of the authority. Restrictions against interchange and tacking do not appear in the permit, but are inherent in applicant's status as an authorized contract carrier. The pertinent provisions of amended section 212(c), requiring the authorization of "the same commodities between the same points or within the same territory" cannot reasonably be interpreted as requiring that exactly the same restrictions imposed against the commodity or territory authority as a contract carrier are to be applied to the commodity or territory authority as a common carrier. It is required that the *same commodities* be authorized, the *same points* between which service may be given, or the *same territory* in which it may operate. The Keystone restriction, appearing in connection with certain commodity authority in applicant's permit, insofar as it operates to restrict the type of persons with whom the carrier may enter into contracts, is not properly applicable to the common carrier authority. When the carrier ceases to be a contract carrier and is authorized to operate as a common carrier, the reason [fol. 24] for such Keystone restriction vanishes. As a common carrier, it offers its services, and must make its services available to all members of the shipping public, within the scope of its authority. It would be inconsistent and incompatible with its duty as a common carrier, to be restricted in the offer of its services in such a manner.

As to the suggested restrictions upon interchange of traffic with other motor carrier, and upon the tacking of authorities to provide through service, it is recognized that restrictions of the nature suggested have been placed from time to time upon common carrier authority. Such restrictions, however, generally are not favored, as limiting and impeding the exercise of common carrier duty and responsibilities, and are imposed only upon a showing of compelling reasons therefor. No compelling reasons have been shown for the imposition of such restrictions upon the common carrier authority to be granted applicant. That applicant as a common carrier may inter-

change traffic with other common carriers, and may tack its authorities to provide through services, is a natural concomitant of common carrier authority. The ability to provide such services, to some degree is an extension of the authority held under the permit, but such additional authority necessarily stems from the inherent characteristics and duties of common carriage rather than from the conversion itself. The mere fact that, to some extent, existing common carriers may be faced with additional competition because of the conversion is not here pertinent or controlling, nor a compelling reason for imposing such limitations upon the common carrier authority of applicant.

In No. MC-72273, the conclusion reached herein is that petitioner is entitled to certain described contract carrier authority, additional to that presently embraced in permit No. MC-72273. Usually, upon the grant of such authority becoming effective, an amended permit would be issued. However, in view of the conclusion in No. MC-72273 (Sub-No. 3) that the outstanding permit should be revoked and a certificate should be issued in lieu thereof, it would appear to be a superfluous act to issue an amended permit and then immediately to revoke it and issue a certificate. A more reasonable course, and one [fol. 25] obviously in conformity with all requirements, in these proceedings is to proceed, in No. MC-72273. (Sub-No. 3), to the revocation of the present permit, and to the issuance of a certificate in lieu thereof which certificate should include the additional authority herein granted in No. MC-72273.

Findings.—In No. MC-72273, the examiner finds that on July 1, 1935, Joseph Burton Montgomery doing business as Montgomery Transfer, was, and that he and his successor continuously since to August 22, 1957 have been engaged in bona fide operation in interstate or foreign commerce as a contract carrier by motor vehicle, over irregular routes, of (1) such commodities as are usually dealt in by manufacturers of rubber and rubber products, from Denver, Colo., to Chicago, Ill., and Omaha, Nebr., and (2) materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago,

and points in Illinois within 100 miles of Chicago, to Denver; that petitioner herein, since August 22, 1957, has been and presently is engaged in operation as a motor carrier in the transportation of the commodities and between the points above described; that petitioner herein is entitled to continue such operations under appropriate authority in addition to the authority presently embraced in permit No. MC-72273, and that the petition herein dated November 20, 1957 to the extent shown should be granted.

In No. MC-72273 (Sub-No. 3), the examiner finds that applicant's operations on August 22, 1957 did not, and presently do not, conform with the definition of a contract carrier as set forth in section 203(a)(15), as amended; that such operations are those of a common carrier by motor vehicle, and are otherwise lawful.

The examiner further finds, in No. MC-72273 (Sub-No. 3), that an appropriate certificate in lieu of the permit now held by applicant, and embracing authority to which applicant herein is found entitled in No. MC-72273, should be issued authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities, between the points, and in [fol. 26] the manner, as described in appendix B hereto; and that applicant's outstanding permit in No. MC-72273 shall coincidentally with the issuance of the foregoing described certificate, be revoked.

In view of the findings herein, it is recommended that the appended orders be entered.

By Robert A. Joyner, Hearing Examiner.

(Signature) Robert A. Joyner

[fol. 27]

APPENDIX A TO APPENDIX C.

*Authority embraced in Permit No. MC-72273**Over Irregular Routes:*

1. *Dried beans*, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

2. And under such contracts or agreements with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials, and supplies* used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.

3. And under such contracts or agreements with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packinghouse products:

Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between

Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

4. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

Such commodities as are usually dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 28]

APPENDIX B TO APPENDIX C

*Authority Granted:**Over Irregular Routes*

1. *Dried beans*, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.
2. *Such commodities* as are dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials, and supplies* used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Merrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.
3. *Such commodities* as are dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.
4. *Such commodities* as are dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east

of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

5. *Such commodities as are dealt in by manufacturers of rubber and rubber products, from Denver, Colo., to Chicago, Ill., and Omaha, Nebr.*
6. *Materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago, Ill., and points in Illinois within 100 miles of Chicago, to Denver, Colo.*

[fol. 29]

ATTACHMENT TO APPENDIX "C"

Recommended by Robert A. Joyner
Hearing Examiner

(Signature) Robert A. Joyner

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on
the day of A.D. 1958.

No. MC-72273

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

It appearing, That on February 28, 1938, the Commission, division 5, entered its order granting certain authority in No. MC-72273, that such order was supplemented by order entered February 17, 1941, and that the application therein was denied in all other respects;

It further appearing, That pursuant to the said orders of February 28, 1938 and February 17, 1941, on August 31, 1943 a permit was issued to J. B. Montgomery, Inc., authorizing certain operations as a contract carrier by motor vehicle;

It further appearing, That upon consideration of the record, and of petition of J. B. Montgomery, Inc., for reopening of "Grandfather" clause application and modification of permit, the Commission, division 1, by order entered March 26, 1958 assigned such petition for hearing; and that by order entered April 11, 1958 the said proceeding was referred to the examiner for hearing and for recommendation of an appropriate order thereon, accompanied by the reasons therefor;

And it further appearing, That investigation of the matters and things involved in the above-entitled proceeding has been made, said matters contained in said petition upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the application in No. MC-72273 be, and it is hereby, reopened; that the said orders entered February 28, 1938 and February 17, 1941, insofar as they denied the application, be, and they are hereby, vacated and set aside; that appropriate additional authority be issued in No. MC-72273 in accordance with the findings in said report; and that such authority in addition to the authority now held in permit No. MC-72273 be embraced in a certificate authorized in said report herein to be issued in No. MC-72273 (Sub-No. 3).

And it is further ordered, That the application in No. MC-72273 in all other respects be and it is hereby, denied.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

[SEAL]

[fol. 30]

Recommended By Robert A. Joyner,
Hearing Examiner

(Signature) Robert A. Joyner

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on
the day of , A.D. 1958.

No. MC-72273 (Sub-No. 3)

J. B. MONTGOMERY, INC., CONVERSION APPLICATION

It appearing, That by order entered January 3, 1958, in No. MC-72273 (Sub-No. 3), the Commission, division 1 instituted an investigation on the Commission's own motion under the provisions of section 212(c) of the Interstate Commerce Act to determine whether the permit No. MC-72273 as a contract carrier held by the J. B. Montgomery, Inc., should be revoked and a certificate of public convenience and necessity as a common carrier be issued in lieu thereof; and that on February 18, 1958 the said J. B. Montgomery, Inc., filed an application under section 212(c) of the act seeking such conversion from contract carrier to common carrier authority; and that by order entered April 10, 1958 the said proceedings were referred to the examiner for hearing and for recommendation of an appropriate order thereon, accompanied by the reasons therefor;

It further appearing, That investigation of the matters and things involved in these proceedings have been made, said proceedings upon due notice having been heard by the examiner, who has made and filed his report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceedings having been duly submitted:

It is ordered, That upon full compliance with the requirements of sections 215, 217, and 221(c) of the act, and with our rules and regulations thereunder, a certificate be issued to J. B. Montgomery, Inc., authorizing

operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities and in the manner described in the findings in the said report.

It is further ordered, That, except to the extent granted, the authority sought in the instant proceeding be, and it is hereby, denied.

It is further ordered, That the proceeding herein instituted on the Commission's own motion be, and it is hereby, discontinued.

And it is further ordered, That this order shall be effective on

By the Commission, division 1..

HAROLD D. MCCOY,
Secretary

[SEAL]

APPENDIX "D" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-72273¹

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

Date of Service—September 26, 1960

Decided September 16, 1960

1. In No. MC-72273, petitioner, as successor in interest, found entitled to additional authority by reason of predecessor's operations conducted on July 1, 1935, and continuously since that time.
2. In No. MC-72273 (Sub-No. 3), operations of applicant found to be those of a common carrier by motor vehicle, and applicant found to be entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, of the commodities, and from, to, or between the points or territories authorized by its presently-held permit. Issuance of a certificate in lieu of presently-held permit approved upon compliance by applicant with certain conditions, and application in all other respects denied. Proceeding instituted herein, on our own motion, discontinued.

Charles W. Singer for J. B. Montgomery, Inc., in both proceedings.

John H. Lewis, Robert D. Means, Edward G. Bazelon, Howard D. Hicks, Alvin J. Meiklejohn, Jr., Marion F. Jones, and Truman A. Stockton, Jr., for protestants in both proceedings.

W. S. Pilling for protestant in No. MC-72273 (Sub-No. 3).

¹ This report also embraces No. MC-72273 (Sub-No. 3), J. B. Montgomery, Inc., Conversion Application.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND HERRING

BY DIVISION 1:

These proceedings were heard separately, but were the subject of a single report and recommended order of an examiner. They concern related matters, and will be disposed of here in a single report. Exceptions to the orders recommended by the examiner in both proceedings were filed by certain protestants, and J. B. Montgomery, Inc., hereafter called Montgomery, petitioner in the title proceeding and applicant in the sub-titled proceeding; replied. Our conclusions differ somewhat from those recommended. [fol. 32] In No. MC-72273; hereafter called the "grandfather" proceeding, by petition filed November 20, 1957, Montgomery, of Denver, Colo., seeks to have the proceeding in which its permit, No. MC-72273, which is reproduced in Appendix A hereto, was issued to its predecessor in interest, reopened and its permit modified to authorize the transportation which, it is claimed, it and its predecessor have performed for the Gates Rubber Company, hereinafter called Gates, of Denver, Colo., prior to and since July 1, 1935. At the hearing Montgomery, through its president, indicated that it desired modification of the permit so as to include, in addition to the authority now embraced in its permit, the authority set forth in Appendix B hereto. Numerous motor carriers² oppose the petition.

In No. MC-72273 (Sub-No. 3), hereafter called the conversion proceeding, by order of January 3, 1958, Division 1, upon its own initiative, instituted a proceeding under section 212(c) of the Interstate Commerce Act to

² Illinois-California Express, Inc., Interstate Motor Lines, Inc., Denver-Chicago Trucking Company, Inc., Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., Watson Bros. Transportation Co., Inc., Centennial Truck Lines, Inc., and Buckingham Transportation, Inc., in its own behalf and as operator of Des Moines Transportation, Inc., hereinafter called I.C.X., Interstate, Denver-Chicago, Ringsby, Navajo, Watson, Centennial, and Buckingham, respectively.

determine whether Montgomery's outstanding permit, authorizing the operations described in Appendix A, should be revoked and a certificate of public convenience and necessity issued in lieu thereof. The order instituting the proceeding names Montgomery as respondent. Thereafter, on February 18, 1958, Montgomery also filed an application [fol. 33] for conversion under section 212(c). We will dispose of the conversion matter on the basis of the application filed by Montgomery. All of the protestants in the "grandfather" proceeding and Pacific Intermountain Express Co., hereinafter called P.I.E., oppose the conversion.

In the "grandfather" proceeding the examiner recommended that permit No. MC-72278 should be modified to include the transportation, over irregular routes of (1) such commodities as are usually dealt in by manufacturers of rubber and rubber products, from Denver to Chicago, Ill., and Omaha, Nebr., and (2) materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago, and points in Illinois within 100 miles of Chicago, to Denver. Watson, on separate exceptions and I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo, on joint exceptions, contend generally that the evidence of Montgomery's witnesses, unsupported by written documents, is not the best evidence; that there were some inconsistencies in the testimony; and that Montgomery has delayed for an unnecessarily long time in taking any action to modify its authority. I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo also contend that the examiner erred in refusing to receive certain letters into evidence; and if any authority is granted it should only authorize service between Denver and Chicago restricted to pickup or delivery at the site of the Gates plant at Denver. In reply Montgomery contends that the evidence presented on its behalf is reliable and consistent, and that the findings of the examiner are fully supported by the evidence.

In the conversion proceeding the examiner found that Montgomery's operations on August 22, 1957, did not [fol. 34] conform to the definition of a contract carrier as set forth in section 203(a) (15), as amended; and that such operations were those of a common carrier by motor

vehicle and were otherwise lawful. He recommended that an appropriate certificate, in lieu of the permit now held by Montgomery, be issued with the so-called "Keystone" restrictions omitted therefrom. On exceptions all those opposing the conversion, with the exception of Centennial, contend, collectively or individually, that the examiner erred (1) in failing to impose restrictions against interchange and tacking, (2) in eliminating existing "Keystone" restrictions, and (3) in failing to consider the issue of dormancy. In addition certain protestants contend that Montgomery did not meet the burden of proving that it was a common carrier; and that the operations of Montgomery and its predecessor were not "otherwise lawful" as is required by section 212(c). Montgomery replies that its operations do not conform to the definition of a contract carrier, are those of a common carrier, and are otherwise lawful; and that no restrictions should be imposed in the certificate to be issued.

The evidence adduced, the examiner's recommendations, the exceptions, and the replies thereto have been considered. We find that the material facts are correctly stated in the examiner's report; and we adopt such statement, as hereinafter supplemented, as our own.

THE "GRANDFATHER" PROCEEDING

The considered permit stems from a "grandfather" application filed on February 10, 1936, by Montgomery's predecessor, Joseph Burton Montgomery, doing business as Montgomery Transfer. Following informal field investigations and the issuance of so-called compliance orders, a permit was issued to petitioner on August 31, 1943, authorizing it to conduct the operations which are described in Appendix A hereto. Montgomery claims that its predecessor also transported, during the "grandfather" period, the commodities, in the manner, and to and from the points described in Appendix B, and that its predecessor and it have been so operating since that time under the impression that such movements were authorized by the permit in issue.

The record contains a deposition of the predecessor, and oral testimony of Montgomery's president, two witnesses

representing Gates, an insurance broker, two former drivers of Montgomery and its predecessor, a driver who drove for a competitor of the predecessor, and a former traffic manager of one of the predecessor's shippers.

The predecessor commenced motor-carrier operations in 1932, and when the business was incorporated on or about 1938 he became president and principal stockholder until 1945 when he retired. He recalls transporting prior to July 1, 1935, shipments of tires and other rubber goods from Denver to Chicago for Gates, and some west-bound transportation of general supplies used in the manufacturing of tires from Chicago to Denver for the same company under an oral agreement. He often drove one of his own trucks. From July 1, 1935, until his retirement he continued to perform services for Gates. He kept a limited bookkeeping system, and the records of his operation have been destroyed. Montgomery's president, son of the predecessor, has been associated with it since 1946, and has been president since 1949. He testified that, to his personal knowledge and recollection, Montgomery has provided transportation for Gates since 1946.

The vice-president for traffic of Gates, employed by Gates since 1912, has used the predecessor's and Montgomery's service for the transportation of tires and other rubber goods from the Gates plant at Denver to Chicago and Omaha from before 1935 to the present time. Also both Montgomery and its predecessor have transported machinery and supplies for Gates since prior to 1935, from Chicago and from unspecified points within 100 miles of Chicago to Denver. The sales manager of Gates' warehouse at Chicago from 1929 to August 1936, knew the predecessor in this period and remembers Montgomery's trucks performing a transportation service inbound to the Chicago warehouse from Denver. One former truckdriver of the predecessor recalls transporting shipments for Gates in 1937 from Denver and also loading tires at the Gates plant, and another truckdriver, who drove for Montgomery and its predecessor from 1936 to 1942, recalls handling loads for Gates continuously during that period. A former competitor of predecessor

in 1932 and 1933 often saw the trucks of predecessor at the Gates plant in Denver. An insurance agent commenced writing insurance for predecessor on January 15, 1935, covering shipments of tires from Denver to Chicago. A former traffic manager for Armour and Company at its Denver plant from 1931 to 1944 first knew the predecessor in 1932, personally assisted him in drawing up the original written contract with Gates in 1936, and recalls that predecessor transported tires for Gates.

[fol. 37] We are of the opinion, despite the fact that much of the evidence concerns incidents occurring over 20 years ago, that the record is convincing that Montgomery or its predecessor were engaged in the operations as set forth in paragraph 5 of Appendix C on and prior to July 1, 1935, and have been so engaged continuously since. We do not agree that in the circumstances here present the oral testimony pertaining to the considered operations is insufficient to warrant the relief sought. Although the records pertaining to the services conducted on and before the effective date have been destroyed, we cannot see any compelling reason why the predecessor should have retained them. We believe that the nine witnesses testifying on behalf of petitioner gave a total picture of petitioner's operations before, on, and since July 1, 1935, and we conclude that they were qualified to testify concerning the facts with respect to the considered operations. See *Beatty Motor Express, Inc.—Modification of Permit*, 71 M.C.C. 307. Some of the protestants also argue that the examiner erred in not allowing certain letters to be admitted into evidence. However, protestants' petition to admit these letters was denied by order of July 28, 1958, and we see no reason for granting the relief here sought and there denied.

One other matter requires a brief comment. Some of the protestants argue that the authority granted should be limited to service between Denver and Chicago restricted to pick up or delivery at the site of the Gates plant at Denver. However, we believe that the evidence is convincing that other points beside Denver and Chicago were served by Montgomery and its predecessor. We [fol. 38] also see no justification for restricting the serv-

ices concerned from and to the Gates plant at Denver. We believe that the modified authority would not have been so restricted if included in the original permit issued pursuant to the determination of the "grandfather" application, and see no compelling reason to do so now. We therefore conclude that Montgomery's present authority should be modified to the extent recommended by the examiner, to include the authority as indicated in paragraph 5 of appendix C.

THE CONVERSION PROCEEDING

Montgomery's operations between July 1 and August 31, 1957, were substantially as authorized under its outstanding permit; during this period it had effective continuing contracts with 12 different shippers. The contract with Gates was considered by Montgomery to be within its authority to perform service under contracts with persons who operate wholesale or retail department stores. Montgomery operates numerous units of equipment, none of which is assigned for the exclusive use of any shipper. Its services do not appear designed to meet the distinct need of any particular customer, and subject only to shipper acceptance of its charges, its service is available to any member of the shipping public having shipments moving within the scope of its authority. Certain of Montgomery's authorities, as indicated in Appendix A, contain "Keystone" restrictions limiting service to shippers of a certain class.

We are of the opinion that, testing applicant's operations by the amended definition of a contract carrier as set forth in section 203(a)(15), it fairly appears that [fol. 39] they do not meet the criteria contained in the amended definition and do not conform thereto. We do not agree with some of the protestants who argue that conversion should not be authorized, because applicant did not prove "operations" on August 22, 1957. "Operations" clearly contemplates the over-all business of, and service rendered by the contract carrier on the critical date, and not the mere physical operations performed on that single day. In light of the facts of record, including the nature of the commodities described in applicant's permit, its

holding out to the public generally, its method of operation, and the number of persons it serves, it is clear that its operations were, on August 22, 1957, that of a common and not a contract carrier.

There remains for consideration the questions whether there should be conversion of portions of applicant's operating authority that are dormant; whether restrictions against interchange and tacking should be imposed; and whether the certificate issued herein should eliminate so-called "Keystone" restrictions. In *T. T. Brooks Trucking Co., Inc., Conversion Application*, 81 M.C.C. 561, the Commission concluded that where only portions of a carrier's operating authority are dormant, the determination of its overall activities and conversion authorized where such operations are found to be those of a common carrier. Since Montgomery's overall operations actually conducted on August 22, 1957, entitle it to conversion, the certificate issued herein will authorize the performance of the transportation service authorized by the permit outstanding on that date.

[fol. 40] In the *Brooks* case it was also concluded that restrictions against interchange of traffic should not be imposed in certificates granted to converted carriers in section 212(c) proceedings. The right of interchange was there held to be a privilege stemming from and incidental to a converted carrier's new common carrier status and not a result of a restatement of the operating authority previously held as a contract carrier. Accordingly, no restriction against interchange of traffic with other common carriers will be imposed in the grant of authority herein. It was found, however, in the *Brooks* case that where the possibility of tacking separately stated operating rights exists, restrictions against such joinder should be imposed in all certificates issued pursuant to section 212(c) proceedings. Under the circumstances, and in view of tacking possibilities in Montgomery's permit, a restriction against such joinder will be imposed in the grant of authority herein.

The *Brooks* case also held that in instances where "Keystone" restrictions appear in the permits of carriers who

are to be converted, the certificates to be issued in lieu thereof should contain terms which will continue, to some extent, at least, the effectiveness of such restrictions. It is considered inappropriate, however, to confine Montgomery's service to establishments of "persons" who operate particular business. Rather, its service will be restricted to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract as indicated in Appendix C herein. This will enable it to furnish sub-[fol. 41] stantially the same service as a common carrier as it is now authorized to provide as a contract carrier thereby insuring substantial parity between the permit and certificate authority.

One other matter deserves our attention. Certain protestants argue on exceptions that since Montgomery and its predecessor have transported products for Gates, without specific authority, that this precludes a finding that its operations have been "otherwise lawful" as is required for conversion by section 212(c). In view of our finding herein in the "grandfather" proceeding that Montgomery is entitled to authority to conduct such operations under the "grandfather" provisions of the Transportation Act of 1935, a finding that such operations conducted since that time were lawful appears to be justified.

FINDINGS

In No. MC-72273, we find that on and continuously since July 1, 1935, Joseph Burton Montgomery, doing business as Montgomery Transfer, was, and that he and his successor J. B. Montgomery, Inc., have been engaged continuously since, in bona fide operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, of the commodities and from and to the points, and in the manner set out in paragraph 5, of Appendix C hereto; that by reason thereof J. B. Montgomery, Inc., is entitled to an amended permit authorizing continuance of such operations in addition to those heretofore authorized; that in light of the finding herein in No. MC-72273 (Sub-No. 3), that J. B. Montgomery, Inc., is entitled to a certificate of public convenience and necessity

in lieu of its outstanding permit, and the provision there-
[fol. 42] in for the issuance of such a certificate, no
amended permit need be issued; and that in all other re-
spects the application should be denied.

In No. 72273 (Sub-No. 3), we find that the operations
of applicant on August 22, 1957, did not and presently
do not conform with the definition of a contract carrier
set forth in section 203(a) (15) of the Interstate Com-
merce Act; that such operations are those of a common
carrier by motor vehicle and are otherwise lawful; that by
reason thereof applicant is entitled to a certificate of
public convenience and necessity authorizing operation,
as a common carrier by motor vehicle, in interstate or
foreign commerce, of the commodities and from and to
the points or territories authorized in its presently-held
permit, as modified herein in No. MC-72273, as set forth
in Appendix C hereto, provided, however, that the certifi-
cate issued to applicant shall be subject to the condition
that the separate authorities contained therein shall not
be tacked or joined, directly or indirectly, for the purpose
of performing any through service; that an appropriate
certificate authorizing such operations should be granted
concurrently with the revocation of the permit now held
by applicant as described in Appendix A hereto; and that,
except to the extent granted herein, the authority sought
in this conversion proceeding should be denied.

Upon compliance by applicant with the requirements
of section 215, 217, and 221(c) of the act and with our
rules and regulations thereunder, an appropriate certifi-
cate will be issued.

[fol. 43] An order will be entered denying the authority
sought except to the extent granted herein.

COMMISSIONER MURPHY, dissenting in part:

I would deny the petition for modification in the
"grandfather" proceeding and limit the conversion to the
operations embraced in applicant's presently held permit.
While the general oral testimony indicates rather con-
vincingly that petitioner has performed some transporta-
tion for the manufacturer of rubber products, it is sig-
nificant that although petitioner indicated that records

were available back to 1942, no documentary evidence in respect of any specific shipments handled for this shipper at anytime since the "grandfather" date was submitted. In my opinion, the unsupported general allegations clearly are insufficient to support a finding of continuous bona fide transportation for about 25 years of the additional commodities from and to the points and areas set forth in Appendix B of the report. Moreover, I consider petitioner's contention that it has been transporting rubber products and other items for Gates under the belief that such service was embraced in its authority to transport "such commodities as are usually dealt in, or used by, wholesale and retail department stores," to be completely untenable.

[fol. 44]

APPENDIX A TO APPENDIX "D"

Authority embraced in Permit No. MC-72273, dated August 31, 1943.

Over Irregular Routes:

1. *Dried beans, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50; to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.*

2. *And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:*

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, equipment, materials, and supplies used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.

3. *And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packinghouse products:*

Such commodities as are usually dealt in, or used by meat, fruit, and vegetable packinghouses, between

Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 45] 4. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

Such commodities as are usually dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

[fol. 46]

APPENDIX B TO APPENDIX "D"

Additional grandfather rights claimed by applicant.

Irregular routes:

Such commodities as are dealt in or used by manufacturers of rubber and related products, and materials, equipment, and supplies used by said manufacturers,

Between Denver, Colo., on the one hand, and; on the other, Chicago, Ill., and Omaha, Nebr.

Materials, equipment, and supplies used by the manufacturers of rubber and rubber products.

From points in Illinois within 100 miles of Chicago to Denver.

[fol. 47]

APPENDIX C TO APPENDIX "D"

Certificate to be issued to J. B. Montgomery, Inc.

Irregular Routes:

1. *Dried beans*, from points and places in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.
2. *Such commodities* as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials, and supplies* used in the conduct of such businesses, from Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morill, and North Platte, Nebr., restricted to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments.
3. *Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products.

4. *Such commodities* as are usually dealt in, or used by, wholesale and retail department stores, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, or the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line; restricted to shipments moving, from, to, or between wholesale or retail department stores.

- [fol. 48] 5. *Such commodities* as are usually dealt in by manufacturers of rubber and rubber products, from Denver, Colo., to Chicago, Ill., and Omaha, Nebr., and

Materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago, and points in Illinois within 100 miles of Chicago to Denver.

[fol. 49]

ATTACHMENT TO APPENDIX "D"

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 16th day of September, A. D. 1960.

No. MC-72273

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

No. MC-72273 (Sub-No. 3)

J. B. MONTGOMERY, INC., CONVERSION APPLICATION

It appearing, That on February 28, 1938, the Commission, division 5, entered its order granting certain authority in No. MC-72273, and that such order was supplemented by order entered February 17, 1941.

It further appearing, That pursuant to the said orders of February 28, 1938 and February 17, 1941, on August

31, 1943, a permit was issued in No. MC-72273 authorizing certain operations as a contract carrier by motor vehicle;

It further appearing, That upon consideration of the record, in No. MC-72273 and of a petition of J. B. Montgomery, Inc., for reopening that proceeding and for modification of its permit, the Commission, division 1, by order entered March 26, 1958, assigned such petition for hearing;

And it further appearing, That investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That the proceeding in No. MC-72273 be, and it is hereby, reopened; that the said orders entered February 28, 1938 and February 17, 1941, be, and they are hereby, vacated and set aside; that appropriate additional authority be granted in No. MC-72273 in accordance with the findings in said report; and that such authority in addition to the authority now held in permit No. MC-72273 be embraced in a certificate authorized in said report herein to be issued in No. MC-72273 (Sub-No. 3), and that in all other respects the said application in No. MC-72273 be, and it is hereby, denied.

And it is further ordered, That the application in No. MC-72273 (Sub-No. 3), except to the extent granted in said report, be, and it is hereby, denied; and that the proceeding instituted herein on our own motion under section 212(c) of the Interstate Commerce Act, be, and it is hereby, discontinued.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

[SEAL]

[fol. 50]

APPENDIX "E" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of May , A.D. 1961.

No. MC-72273

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

No. MC-72273 (Sub-No. 3)

J. B. MONTGOMERY, INC., CONVERSION APPLICATION
(Denver, Colo.)

Upon consideration of the record in the above-entitled proceeding, and of:

- (1) Petition of applicant, filed October 26, 1960, for reconsideration in No. MC-72273 (Sub-No. 3);
- (2) Petition of Watson Bros. Transportation Co., Inc., protestant dated October 25, 1960, for reconsideration;
- (3) Joint petition of Illinois-California Express, Inc., Denver-Chicago Trucking Company, Inc., Interstate Motor Lines, Inc., Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., and Centennial Truck Lines, Inc., protestants, dated October 24, 1960, for reconsideration;
- (4) Reply to petition in (1) above, by Watson Bros. Transportation Co., Inc., protestant, dated November 3, 1960;
- (5) Reply to petition in (1) above, by Pacific Inter-mountain Express, Co., protestant, filed November 14, 1960;

(6) Reply to petitions in (2) and (3) above, by applicant, filed November 25, 1960;

and good cause appearing therefor:

It is ordered, That the said petitions be, and they are hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law.

By the Commission.

HAROLD D. MCCOY,
Secretary

[SEAL]

[fol. 51]

APPENDIX "F" TO COMPLAINT

ORDER

RV-150-C

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on
the 21st day of September, A. D., 1961

No. MC 72273

J. B. MONTGOMERY, INC.,
DENVER, COLORADO

REVOCATION OF OPERATING AUTHORITY ISSUED AUGUST
31, 1943, AS MODIFIED BY ORDER ENTERED SEPTEMBER
16, 1960 (PROPERTY)

It appearing, That operating authority was issued to
the above-named carrier on the date specified above au-
thorizing operations in interstate or foreign commerce as
a motor carrier under the Interstate Commerce Act;

It further appearing, That an order in No. MC 72273
Sub 3, decided September 16, 1960, authorized the iss-
uance of a certificate to the above-named carrier, and No.
MC 123639 Sub 2 has been assigned thereto; that said
order provided that carrier's outstanding Permit No. MC
72273 shall be revoked coincidentally with the issuance of
the authorized certificate; therefore,

It is ordered, That the operating authority in Docket
No. MC 72273 be, and it is hereby, revoked.

By the Commission, Division 1.

HAROLD D. MCCOY,
Secretary

[SEAL]

SERVICE DATE
SEPTEMBER 21, 1961

[fol. 52]

APPENDIX "G" TO COMPLAINT

SERVICE DATE
SEPTEMBER 21, 1961CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY C-15.3

No. MC 123639 SUB 2*

J. B. MONTGOMERY, INC.,
DENVER, COLORADO

At a Session of the INTERSTATE COMMERCE COMMISSION,
Division 1, held at its office in Washington, D. C., on
the 21st day of September, A.D., 1961

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pur-

* Proceeding was instituted under Section 212(c) of the Act, in No. MC 72273 Sub 3 for conversion of respondent's contract carrier authority to common carrier authority. Pursuant to the report of the Commission decided September 16, 1960, common carrier operations were authorized, and No. Mc123639 Sub 2 has been assigned thereto.

suant of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Dried beans,

From points in that part of Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, to Des Moines, Iowa, and points in that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

Such commodities as are usually dealt in by whole or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials and supplies* used in the conduct of such businesses,

From Chicago, Illinois, to Sterling, Fort Morgan, Yuma, Loveland and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr. with
[fol. 53] no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments.

Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products,

Such commodities, as are usually dealt in, or used by, wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving, from, to, or between wholesale or retail department stores.

Such commodities as are usually dealt in by manufacturers of rubber and rubber products,

From Denver, Colo., to Chicago, Ill., and Omaha, Nebr., with no transportation for compensation on return except as otherwise authorized.

Materials, equipment and supplies used by manufacturers of rubber and rubber products,

From Chicago, Ill., and points in Illinois within 100 miles of Chicago, Ill., to Denver, Colo., with

no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The separate authorities contained herein shall not be tacked or joined, directly or indirectly, for the purpose of performing any through service.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

[SEAL]

[fol. 54] . . .

[fol. 55]

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLORADO

Civil Action No. 7384

[Title Omitted]

[File Endorsement Omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION—

Filed March 19, 1962

Now come the United States of America and the Interstate Commerce Commission, defendants in the above-styled action, and for answer to the complaint therein filed:

I.

Admit the allegations of paragraphs I to III, inclusive.

II.

Admit the allegations of paragraph IV, except that defendants deny that Plaintiffs' operations subsequent to August 22, 1957, have been those of a contract carrier by motor vehicle. Defendants further allege that, by virtue of the 1957 amendment to Section 203(a)(15) of the Interstate Commerce Act, Plaintiffs' operations since August 22, 1957, have been those of a common carrier by motor vehicle.

III.

Admit the allegations of paragraph V.

[fol. 56]

IV.

Admit the allegations of paragraph VI, except that defendants allege that, in addition to the proceeding instituted by the Commission under Section 212(c), an application for conversion was filed by the plaintiffs themselves on February 18, 1958, pursuant to section 212(c), and the case was decided by the Commission on the basis of the application filed by the plaintiffs.

V.

Admit the allegations of paragraphs VII to X, inclusive.

VI.

Deny the allegations of paragraph XI, and deny that the report and orders of the Commission are invalid for any of the reasons therein alleged, or for any reason whatsoever.

VII.

Except as expressly admitted herein, each and every allegation of the complaint is denied.

WHEREFORE, having fully answered, the defendants pray that the complaint be dismissed and the relief therein prayed for be denied.

/s/ John H. D. Wigger
Attorney
Department of Justice
Washington 25, D. C.

LEE LOEVINGER
Assistant Attorney General
LAWRENCE M. HENRY
United States Attorney
Denver, Colorado
Attorneys for the United States of America

/s/ Betty Jo Christian
Attorney
Interstate Commerce Commission
Washington 25, D. C.

ROBERT W. GINNANE
General Counsel

Attorneys for the Interstate Commerce Commission

[fol. 57]

[CERTIFICATE OF SERVICE

Omitted in Printing]

[fols. 58-61] * * *

[fol. 62]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. 7384

[Title Omitted]

[File Endorsement Omitted]

ORDER SUBSTITUTING PARTY PLAINTIFF May 21, 1962

It appearing pursuant to the stipulation of the parties, that J. B. Montgomery, Inc., an Iowa corporation, has succeeded to the interest in the operating rights in issue herein issued by the Interstate Commerce Commission to J. B. Montgomery, Inc., a Nebraska corporation, Plaintiff, and the parties having agreed to a substitution of Plaintiff,

IT IS ORDERED that J. B. Montgomery, Inc., an Iowa corporation, be substituted as plaintiff.

DATED at Denver, Colorado, this 21st day of May, 1962.

BY THE COURT:

/s/ Jean S. Breitenstein, Circuit Judge
United States Court of Appeals
Tenth Circuit

/s/ Alfred A. Arraj, Chief Judge
United States District Court

/s/ Hatfield Chilson, Judge
United States District Court

[fol. 63] . . .

[fol. 64]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, DEFENDANTS

[File Endorsement Omitted]

Charles W. Singer, 33 North LaSalle Street, Chicago 2, Illinois, and Joseph W. Morrissey, Jr., of the firm of Holme, Roberts, More & Owen, 1700 Broadway, Denver 2, Colorado, for Plaintiff; Lee Loevinger, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., and Lawrence M. Henry, United States Attorney, Denver, Colorado, for the Defendant United States of America; Robert W. Ginnane, General Counsel, and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D. C., for the Defendant Interstate Commerce Commission.

Before BREITENSTEIN, Circuit Judge, ARRAJ and CHILSON,
District Judges.

CHILSON, District Judge.

[fol. 65] MEMORANDUM OPINION AND ORDER—
July 6, 1962

This is an appeal from a decision of the Interstate Commerce Commission, herein referred to as the "Commission."

After the filing of the complaint herein, J. B. Montgomery, Inc., an Iowa corporation, succeeded to the in-

terests of the original plaintiff, J. B. Montgomery, Inc., a Nebraska corporation, and the former has been substituted as plaintiff herein. Both will be referred to herein as "Montgomery."

The controversy centers around certain restrictions placed by the Commission in a certificate of public convenience and necessity issued to Montgomery in 1961.

The events leading to the dispute are as follows:

Montgomery was issued a permit under the "grandfather" provisions of the 1935 Motor Carriers Act, Section 209(a) [49 U.S.C. Section 309(a)],¹ to operate as a "contract carrier" by motor vehicle. The permit authorized Montgomery to transport under individual contracts [fol. 66] tracts or agreements with certain classes of shippers certain commodities from certain designated geographical areas to other geographical areas, without restriction as to the actual points of pickup and delivery within the areas specified.

Prior to 1957, a "contract carrier" was defined by Section 203(a) (15) [49 U.S.C. Section 303(a) (15)] as follows:

"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other

¹ The pertinent parts of Section 309(a) (1) are:

"Except as otherwise provided in this section and in section 310a (regarding temporary authority) of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, - - - the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935.

than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

In 1957, the foregoing section was amended to read:

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

To protect the interests of those "contract carriers" who held existing permits but who did not fall within the amended definition of "contract carrier", Congress, in the 1957 amendments, enacted Section 212(c), which provides:

"The Commission shall examine each outstanding permit and may within one hundred and eighty days after August 22, 1957, institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on August 22, 1957, do not conform with the definition of a contract carrier in section 303(a) (15) [fol. 67] of this title as in force on and after August 22, 1957; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same

points or within the same territory as authorized in the permit."

To make certain that no carrier would escape Commission regulation with respect to its interstate operations, there was also included in the 1957 amendment Section 203(c) [49 U.S.C. Section 303(c)] which provides:

"- - - no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, - - -"

In January, 1958, the Commission instituted a proceeding under Section 212(c) to determine if Montgomery's permit should be revoked and a certificate of public convenience and necessity issued in lieu thereof. Montgomery filed a petition affirmatively seeking conversion of its permit to a certificate.

After hearings, the Commission concluded that Montgomery's operations were no longer those of a "contract carrier" but were those of a "common carrier", were otherwise lawful, ordered Montgomery's permit revoked and authorized the issuance to Montgomery of a certificate of public convenience and necessity.

The certificate authorized Montgomery to transport, as a "common carrier", the same commodities to and from the same geographical areas as set forth in the permit, but as to three of the authorities the certificate restricted [fol. 68] the points of pickup and delivery "to shipments moving from, to, or between wholesale and retail" outlets or stores." These restrictions did not appear in the permit.

² A comparison between the wording of the permit and the certificate as to one of the three questioned authorities will serve to illustrate the differences between the permit and the certificate.

AUTHORITY UNDER PERMIT:

"3. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business

The Commission determined the restrictions were necessary to prevent an enlargement of the scope of operations under the certificate as compared with past operations [fol. 69] under the permit. Or to put it another way, the Commission determined the restrictions were necessary to assure "substantial parity" between future operations under the certificate and past operations under the permit.

By this action Montgomery questions the Commission's authority to impose these restrictions.

The applicable principles of law are:

(1) Administrative determinations must have a basis in law and must be within the granted authority, and it is a judicial function and not an administrative function to determine the limits of the statutory power. *Social Security Board v. Nierotko*, 327 U.S. 358.

(2) Orders of an administrative agency may not be set aside, modified or disturbed if they are within the scope of the Commission's statutory authority and are based

of which is the sale of meat, fruit, and vegetable packinghouse products: *Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line."

AUTHORITY UNDER THE CERTIFICATE:

"*Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on the east of U. S. Highway 87 and on and north of U. S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products.

upon adequate findings, which in turn are supported by substantial evidence. *United States v. Peerless Auto Freight Lines*, 327 U.S. 515; *Rochester Telephone Corp. v. United States*, 307 U.S. 125.

(3) There is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503; *Baltimore and Ohio R.R. v. United States*, 298 U.S. 349.

Montgomery asserts the restrictions are beyond the scope of the Commission's statutory authority.

Montgomery contends that the last sentence of Section 212(c), which reads:

[fol. 70] "Such certificate so issued shall authorize the transportation as a common carrier of the same commodities between the same points or within the same territory as authorized in the permit." (Emphasis added),

is mandatory and allows the Commission no discretion or power to impose territorial restrictions not contained in the permit; that the legislative history discloses no intent on the part of Congress to authorize such territorial restrictions, but on the contrary, the legislative history indicates it was the intent of Congress that there should be no restriction of any rights held under the permit.

The Commission asserts the following statutory authority:

(1) Section 208(a) of the Motor Carriers Act [49 U.S.C. Section 308(a)] relating to issuance of both "grandfather" and new certificates provides that the Commission may specify "the services to be rendered and the routes over which - - - or the territory within which the motor carrier is authorized to operate" and this is statutory authority for the imposition of the restrictions here in question.

(2) The "grandfather" provisions of the Motor Carrier Act, Section 206(a) (1) [49 U.S.C. Section 306(a) (1)], authorize the Commission to assure "substantial parity" between future operations and prior bona fide operations;

that Section 212(c) is in the nature of a "grandfather" provision, and therefore, the Commission has the same power to accomplish "substantial parity" under Section 212(c) as it has under Section 206(a) (1).

(3) There is nothing in 212(c) or its legislative history expressing a congressional intent to limit the Commission's power to impose territorial restrictions in certificates issued to converted carriers and the Commission's authority is implicit in the Act.

(4) The imposition of territorial restrictions preserving "substantial parity" is responsive to the intent of Congress expressed in the National Transportation Policy's injunction that the Act be administered to the end of developing and preserving an adequate, efficient and economical transportation system.

In short, the Commission construes Section 212(c) to authorize the imposition of such limitations as the Commission determines will accomplish "substantial parity" between Montgomery's previous operations as a permit carrier and its future operations under the certificate.

We will discuss the Commission's contentions in order.

Section 208(a) [49 U.S.C. Section 308(a)] reads in part as follows:

"Any certificate issued under section 306 (grandfather provisions) or 307 (new certificates) - - - shall specify the service to be rendered and the routes over which - - - the territory within which the motor carrier is authorized to operate."

Under this provision and Section 206(a) [49 U.S.C. Section 306(a)] (grandfather provisions) the delineation of the area and specification of localities which may be served has been entrusted by the Congress to the Commission. *United States v. Carolina Carriers Corp.*, 315 U.S. 475 at 480.

But the statutory authority provided by Section 208(a) to delineate the area of service is specifically limited to certificates issued under sections 306 or 307. The certificate in question here was issued under Section 212(c), which contains no such statutory authority. In fact, [fol. 72] Section 212(c) specifically states that the Com-

mission "shall authorize the transportation of the same commodities between the same points or within the same territory as authorized in the permit." (Emphasis added). In view of this specific mandate of the Congress, we are unable to read into Section 212(c) the powers of delineation and specification of territory which are contained in Section 208(a).

Nor do the "grandfather" provisions of the Motor Carrier Act, Section 206(a) (1) [49 U.S.C. Section 306(a) (1)], authorize the Commission to impose the restrictions here in question.

The Supreme Court has held that the Commission is empowered to impose territorial limitations on a certificate issued under the "grandfather" provisions to assure "substantial parity" between future operations and prior bona fide operations. *Alton R.R. v. United States*, 315 U.S. 475; *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 480. However, the authority for this power is derived from express delegations of power by Congress. Section 208 [49 U.S.C. Section 308] provides:

"Any certificate issued under section 306 (grandfather provisions) - - - shall specify the service to be rendered - - - the territory within which the motor carrier is authorized to operate."

Section 306 referred to above, (Section 206(a) [49 U.S.C. Section 306(a)]) (grandfather provisions), provides that the issuance of a certificate under the grandfather provisions is dependent upon the bona fides of previous operations to be determined by the Commission. It was these two provisions of the Act, (Section 206(a), 49 U.S.C. 306(a) and Section 208(a), 49 U.S.C. 308(a)), to which the Supreme Court pointed in *United States v. [fol. 73] Carolina Carriers Corp.*, 315 U.S. 475, when the Court stated:

"The precise delineation of the area or the specification of localities which may be served has been entrusted by Congress to the Commission."

Section 212(c) neither authorizes the Commission to specify territory nor determine bona fides of prior operations.

The last sentence of Section 212(c) expressly states that the certificate shall authorize transportation "of the same commodities between the same points - - - as authorized in the permit." (Emphasis added). This is tantamount to saying that the Commission shall not impose territorial restrictions beyond those contained in the permit.

There is nothing in the legislative history cited by the Commission indicating a contrary congressional intent. On the other hand, there is some support in the legislative history for this construction. During the hearings upon the bill before a Subcommittee of the Senate Interstate and Foreign Commerce Committee, the following exchange took place between Mr. Barton, transportation counsel for the Committee, and Mr. Clarke, then chairman of the Interstate Commerce Commission:

"Mr. Barton: - - -

Mr. Clarke, do you think there is any constitutional difficulty in changing, as we say, as you propose, a contract carrier to a common-carrier status?

Mr. Clarke: No, I can see none. *It isn't taking away from them anything that they have; it isn't disturbing any property rights of the contract carrier. It is giving him greater opportunity. He can still serve his contract shippers, but through the conversion provisions of the bill he would also have the opportunity to serve the general public as well as the obligation.*" (Emphasis added) (P. 35 Hearings—[fol. 74] Surface Transportation—Scope of Authority of Interstate Commerce Commission, 85th Cong. 1st Session).

The fact that Congress has expressed an intention that the Act be administered to the end of developing and preserving an adequate, efficient and economical transportation system, does not give to the Commission unlimited authority to proceed in any manner which the Commission believes will accomplish these objectives. The Commission, in accomplishing the objectives, must proceed within the limit of its statutory authority and we find no such authority to impose the restrictions in question.

The Commission points out that the conversion of the permit to a certificate eliminates the permit restrictions which confined Montgomery's service to those which it served under individual contracts or agreements, and under the certificate Montgomery is now at liberty to serve any members of the public dealing in the commodities authorized for transportation by the certificate. The Commission indicates, that in the absence of restrictions to assure "substantial parity", the scope of the operations of Montgomery and other converted carriers under certificates may be greatly expanded as contrasted with their past operations under permits, and that such enlarged operations will have an adverse effect upon the industry.

This enlargement in the scope of operations of converted carriers was recognized in the legislative history which we have previously quoted. Mr. Clarke, the chairman of the Interstate Commerce Commission, stated that the conversion from a permit to a certificate not only didn't take away anything from the carrier, but gave him [fol. 75] a greater opportunity. "He can still serve his contract shippers, but through the conversion provisions of the bill he would also have the opportunity to serve the general public as well as the obligation." (Hearings supra). There is nothing in the Act or its legislative history indicating that Congress intended to restrict this enlargement of operations by the test of "substantial parity" or otherwise.

Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish "substantial parity" between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history.

The Commission also complains of Montgomery's failure to produce any evidence to demonstrate that it had in the past ever performed any services which could not be continued under the territorial limitations imposed by the Commission. The Commission states:

"In the absence of such evidence, the Commission was justified in concluding that such territorial limitations would enable it to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier, thereby insuring substantial parity between the permit and certificate authority."

Having held that a certificate to be issued under Section 212(c) is not subject to the test of "substantial parity" and there being no other issue raised, such as abandonment or dormancy, to which evidence of previous operations would be material, Montgomery was under no compulsion to offer evidence concerning his previous operations.

[fol. 76] We hold that the Commission was without statutory authority to impose the restrictions in question.

The order of the Commission is set aside and the matter is remanded for further action by the Commission in accordance with the views herein expressed.

This opinion sufficiently states the findings of fact and conclusions of law of the court. Further findings of fact and conclusions of law are not necessary.

The Clerk will enter an appropriate judgment.

DATED at Denver, Colorado, this 6th day of July, A. D. 1962.

BY THE COURT:

/s/ Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals

/s/ Alfred A. Arraj, Chief Judge
United States District Court

/s/ Hatfield Chilson, Judge
United States District Court

[fol. 77]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

vs.

**UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, DEFENDANTS**

[File Endorsement Omitted]

JUDGMENT—July 10, 1962

THIS CAUSE came before this statutory court and pursuant to the Memorandum Opinion filed herein, it is

ORDERED that the Order of the Interstate Commerce Commission of September 16, 1960, and the Order of May 17, 1961, in its Docket No. MC-72273 (Sub.No. 3) be set aside and the matter remanded for further action by the Commission in accordance with the views expressed in the Memorandum Opinion of this Court.

DATED at Denver, Colorado, this tenth day of July, 1962.

BY THE COURT:

**/s/ Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals**

**/s/ Alfred A. Arraj, Chief Judge
United States District Court**

**/s/ Hatfield Chilson, Judge
United States District Court**

[fol. 78]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

(Title Omitted)

(File Endorsement Omitted)

**NOTICE OF APPEAL BY THE UNITED STATES TO THE
SUPREME COURT OF THE UNITED STATES—
Filed September 7, 1962**

I.

Notice is hereby given that the United States of America, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment and order entered in this action on July 10, 1962.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101 (b).

II.

The Clerk of the District Court will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of the plaintiff, filed January 16, 1962, with its Appendices "A", "B", "C", "D", "E", "F", and "G".

2. Order of Court of January 24, 1962, designating the three-judge court to hear and decide the case.

3. Joint Answer of the United States of America and Interstate Commerce Commission, filed March 19, 1962.

4. Notice by the Court of April 6, 1962, of the scheduled hearing before the court on May 22, 1962.

5. Stipulation regarding the filing of simultaneous briefs prior to oral argument.

[fol. 79] 6. Order of Court of May 14, 1962, for the filing of briefs pursuant to the stipulation of the parties.

7. Order of Court approving a stipulation that J. B. Montgomery, Inc., an Iowa corporation, the successor in

interest to J. B. Montgomery, Inc., a Nebraska corporation, be substituted as Plaintiff.

8. Those documents presented to the Court by plaintiff as the record made before the Interstate Commerce Commission in its Docket No. MC-72273.

9. All other documents, if any, presented to the Court by any party to the suit.

10. Opinion of the Court, filed July 6, 1962.

11. Judgment of the Court, filed July 10, 1962.

12. All other orders, if any, entered by the Court in this case.

13. The clerk's docket and minutes entries in the case.

14. This Notice of Appeal.

III.

The following question is presented by this appeal:

Whether the Interstate Commerce Commission, in a proceeding under Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c), converting a contract carrier permit into a common carrier certificate, may limit the carrier's authority to service to, from, or between the particular types of business which, under the contract carrier permit, the carrier had been authorized to serve.

/s/ Robert B. Hummel
Attorney
Department of Justice

Dated:

[fol. 80].

[CERTIFICATE OF SERVICE
Omitted in Printing]

[fol. 81]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 7384

[Title Omitted]

[File Endorsement Omitted]

**NOTICE OF APPEAL BY THE INTERSTATE COMMERCE
COMMISSION TO THE SUPREME COURT OF THE UNITED
STATES—Filed September 7, 1962**

I.

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment and order entered in this action on July 10, 1962.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

II.

The Clerk of the District Court will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of the plaintiff, filed January 16, 1962, with its Appendices "A", "B", "C", "D", "E", "F", and "G".
2. Order of Court of January 24, 1962, designating the three-judge court to hear and decide the case.

[fol. 82] 3. Joint Answer of the United States of America and Interstate Commerce Commission, filed March 19, 1962.

4. Notice by the Court of April 6, 1962, of the scheduled hearing before the court on May 22, 1962.

5. Stipulation regarding the filing of simultaneous briefs prior to oral argument.

6. Order of Court of May 14, 1962, for the filing of briefs pursuant to the stipulation of the parties.

7. Order of Court approving a stipulation that J. B. Montgomery, Inc., an Iowa corporation, the successor in interest to J. B. Montgomery, Inc., a Nebraska corporation, be substituted as Plaintiff.

8. Those documents presented to the court by plaintiff as the record made before the Interstate Commerce Commission in its Docket No. MC-72273.

9. All other documents, if any, presented to the court by any party to the suit.

10. Opinion of the Court, filed July 6, 1962.

11. Judgment of the Court, filed July 10, 1962.

12. All other orders, if any, entered by the Court in the case.

13. The clerk's docket and minute entries in the case.

14. This Notice of Appeal.

III.

The following questions are presented by this appeal:

(1) Whether the District Court erred in holding that the Interstate Commerce Commission lacks the power, in a conversion proceeding arising under section 212(c) of the Interstate Commerce Act, 49 U.S.C. § 312(c), to limit the common carrier certificate issued on conversion [fol. 83] to service to, from, or between the facilities of a particular type of business, when the previously-held contract carrier permit had limited the carrier to service performed under contract with persons who are engaged in that same type of business.

(2) Whether the District Court erred in holding that the Interstate Commerce Commission lacks the power, in a conversion proceeding under section 212(c), to limit the

common carrier certificate issued on conversion so as to authorize only the same type of service which had been authorized by the previously-held contract carrier permit.

/s/ Betty Jo Christian
Attorney
Interstate Commerce Commission
Washington 25, D. C.

/s/ Robert W. Ginnane
General Counsel

Attorneys for the Interstate Commerce Commission

[fol. 84]

[PROOF OF SERVICE omitted in Printing]

[fols. 85-88] * * *

[fol. 89]

[Clerk's Certificate to foregoing
transcript omitted in printing]

[fol. 90]

SUPREME COURT OF THE UNITED STATES

No. 791, October Term, 1962

UNITED STATES, ET AL., APPELLANTS

vs.

J. B. MONTGOMERY, INC.

ORDER NOTING PROBABLE JURISDICTION—March 25, 1963

APPEAL from the United States District Court for the District of Colorado.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

March 25, 1963

